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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY CHAFFIN, Defendant and Appellant.	B207916 (Los Angeles County Super. Ct. No. TA089087)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Margaret E. Maxwell, Deputy Attorney General, for Plaintiff and Respondent.

Appellant, Mark Anthony Chaffin, appeals from the judgment imposed following his conviction by jury of first degree felony murder (Pen. Code, §§ 187, 189; undesignated section references are to that code), carjacking (§ 215, subd. (a)), robbery (§ 211), and arson of property (§ 451, subd. (d)). The jury further found as special circumstances that appellant committed the murder while engaged in the commission of a carjacking (§ 190.2, subd. (a)(17)(L)), and a robbery (§ 190.2, subd. (a)(17)(A)). Appellant admitted suffering a prior serious felony and strike conviction (§ 667, subds. (a)-(i).) He was sentenced to a term of life without possibility of parole, plus five years for the prior conviction and four years for the arson. Sentences for the carjacking and robbery were stayed under section 654.

Appellant raises the following contentions: (1) insufficient evidence supports the robbery conviction, requiring reversal not only of that count but also the felony murder conviction and the robbery special circumstance finding; (2) the court erroneously failed to instruct the jury on theft as a lesser included offense of robbery and on involuntary manslaughter and second degree murder as lesser included offenses of first degree felony murder. These errors individually require reversal, as does their cumulative prejudice; (3) the sentence of life without possibility of parole (LWOP) is unconstitutional under state and federal proscriptions of cruel and/or unusual punishment.[1]

We have concluded that none of appellant's contentions is meritorious. We therefore affirm the judgment.

FACTS

1. The Carjacking, Robbery, and Murder of Jose Renteria.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence at trial showed that on the evening of Saturday, August 26, 2006, the victim, Jose Renteria, arrived with a companion at Sour Dough

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[1] Appellant initially contended that his parole revocation fine under section 1202.45 was unauthorized, but he has conceded that issue in light of recent Supreme Court precedent. (*People v. Brasure* (2008) 42 Cal.4th 1037.)

Joe's restaurant, at 17814 South Main Street in Gardena. According to bartender Debra Johnson, during approximately two and one-half hours the two men each consumed about six bottles of beer. After Renteria left the bar, Johnson heard a vehicle motor running for at least 20 minutes. She went outside and saw Renteria asleep in the front seat of a four-door truck, parked at the curb with its engine running and its interior light on. Numerous $20 bills were in Renteria's lap and on the floor, along with a wallet. Johnson walked around to the driver's side, knocked on the window, and told Renteria to turn off the ignition or he would "get a D.U.I." She also told him to put his money away or he would "get robbed." Renteria looked at Johnson and nodded.

Ten minutes later, Johnson heard the engine again and looked outside. Renteria was still in the truck, which had been moved forward between two driveways. The situation remained the same 10 minutes later. After about 10 more minutes, Johnson heard what sounded like a woman's scream. She looked outside, and the truck was no longer there. Alerted by a neighborhood child that there might be a body in the road, Johnson proceeded on Main for about 100 feet, and found Renteria's body lying against the center divider, his head more in the roadway.

Los Angeles Sheriff's Deputy Jason Parolini responded to the scene. He discovered Renteria lying in the Main Street lane close to the center divider. He had a large forehead laceration, facial trauma, and tire tracks on his back. There was a pool of blood to his right. Using a cell phone he found in the street, Parolini determined the victim's identity and learned that he owned a 2003 black, four-door Dodge Ram truck.

Sheriff's Sergeant Richard Biddle and his partner Sergeant Wegener also arrived at the location. Biddle observed a tire mark on the curb of the center divider, but no skid or brake marks on the two-lane street.

On August 30, 2006, Deputy Los Angeles Medical Examiner Juan Carrillo performed an autopsy on Renteria. Carrillo opined that the cause of death was multiple blunt force traumas that had crushed and fractured most of the victim's ribs, puncturing his lungs and severing his liver, and causing extensive abdominal bleeding. Both clavicles were broken, and the body also showed head abrasions, lacerations, and

bleeding of the scalp, as well as abrasions of the chest, abdomen, flank, and back. A pattern abrasion of the back was consistent with a tire mark. The injuries were predominantly to the victim's left side, and together they were consistent with his being run over by a vehicle, primarily on that side, while face down.

At the trial, three of appellant's friends, all of whom had criminal records, described appellant's complicity in Renteria's death and the forcible taking of his truck. Dennis Thies had recently pled guilty to voluntary manslaughter in this case and received a 22-year sentence for his promise to testify truthfully against appellant. Admitting he had first spoken falsely to detectives, Thies testified that his most recent discussion with them had been truthful, and he also had given sworn testimony during his plea proceedings.[2]

Thies testified that in August, 2006, he had known appellant for about a year. The two had used drugs together, among other things. Thies then was using methamphetamine on a daily basis. On the night of August 26, Thies drove with appellant to pick up drugs from one Ruiz, at his house behind Sourdough Joe's. As they approached the driveway to the house, Thies saw a black truck with its engine running and lights on, parked in front of the building next to the restaurant. He saw no one inside the truck, and remarked about that to appellant. Appellant responded that he didn't see anyone either.

Thies drove up the driveway and received the drugs, then turned back to Main Street. The truck was still there, apparently unoccupied. Thies pulled to the curb, "So we could take the truck." Appellant got out of the car, while Theis phoned Ruiz, his drug supplier, to make sure that the truck did not belong to anyone whom he knew. Appellant walked to the passenger side of the truck and looked inside. He then walked around the back to the driver's door and got in. Thies next saw appellant behind the wheel of the truck, with another man standing outside the driver's door. There was a little movement

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[2] It was agreed that Thies was an accomplice, and the jury was instructed accordingly.

by appellant, and then the other man was on the ground. Thies believed appellant kicked him. The truck pulled away from the curb, and Thies drove away too.

About 20 minutes later, appellant met Thies at his house. Appellant showed Thies a $100 bill, which he said he had found on the floor of the truck. Thies took it and commingled it with other funds, which his wife, Yolanda Garcia, used to buy more drugs.

The next afternoon, appellant again came to Thies's home, this time fearful and crying. He explained that the man from the truck had died. Appellant didn't say how that had happened, but Thies knew that appellant had hit the center divider when he left the curb. Garcia was present at part of the conversation. Earlier, Thies had told the police that after appellant got into the truck, a Mexican man chased after him and Thies saw appellant fighting with the Mexican and kicking him by the truck's door. Thies also told Detectives Biddle and Wegener that when appellant came to his house crying, he said that he had run over the guy and that's why he was dead.[3]

Thies's wife Garcia, also a friend of appellant, was under a state prison sentence for assault with a deadly weapon when she testified. She also had felony drug convictions. Garcia first denied or professed not to recall that appellant had come to her house in a stolen truck and had arrived there crying. Garcia further denied recalling, or having told the deputies, that appellant had obtained $100 from the truck (which she used to buy drugs) and that appellant had admitted that he ran over the victim at the center divider. The prosecutor then played, and read in part, a recording of Garcia's January 2007 interview by Detectives Biddle and Wegener, as authenticated by Biddle. During that interview, she told the detectives that appellant had said he'd gotten $100 from the truck and that he had come to the door crying, and he couldn't believe the man had died. Appellant had explained he had run him over with the truck at the center divider, killing

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[3] On cross-examination, Thies recalled denying, when he pled guilty, that he and appellant had discussed taking the vehicle and any money inside. He also stated he had seen appellant and the victim scuffling, appellant inside the truck and the victim outside.

him. Appellant told Garcia he had pulled the victim out of the truck, but he then got up, and Garcia said, "I guess he was trying to get back in."[4]

Also testifying was Michael Visser, another friend of appellant who was serving a prison term for two auto thefts. In August 2006, Visser knew both appellant and Thies and was a daily drug user. At that time appellant told him that he had seen a truck running, got in, and took off. Appellant also told Visser he had found $100 on the floor of the truck.[5]

Stephan Schliebe, a sheriff's department criminalist, compared a tire impression on Renteria's shirt to impressions of his truck's four tires that senior criminalist John Bockrath had rolled onto poster boards. Schliebe explained that it might be impossible to distinguish two tires of the same size from the same manufacturer. He concluded, however, that the impression on the shirt had the same tread design and pitch sequence characteristics – elements of the circumference – and hence the same manufacturer, as the tires of the victim's truck. The shirt's impression could have been made by one of those tires, or by another tire with the same tread and characteristics.

Criminalist Bockrath also recovered two samples of human tissue from the undercarriage of the truck, near the left side doors.

2. The Arson of the Truck.

Near midnight on August 27, 2006, the day after the appellant took the truck, Visser and Thies drove from Thies's house to a location near 166th Street and Gramercy Place in Gardena. Before leaving, Thies had poured gasoline from his own truck into a

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4 On cross-examination, Garcia explained that at the time she spoke to the officers, she was trying to regain custody of her daughters from foster care and she would have said anything to do so. On redirect, she stated she had had no recollection of the events because of her drug use and may have lied to the sheriffs. She denied making or recalling her statements to them.

5 On cross and redirect examination, Visser stated it was Thies who had told him about this, but that Thies had done so in the presence of appellant, who had not disputed it.

two-liter soda bottle. He had a flare gun with him. At the location, appellant stood near Renteria's truck, the driver's side door of which was open. Thies picked up the flare gun and held it out his car's window. Appellant came over, grabbed the gun, and discharged it into the truck cab. A ball of flame exploded inside the truck and out the driver's door.

The flames also engulfed appellant, and his lower body particularly began to burn. Appellant patted himself, and an onlooking neighbor, Michael Poh, told him to roll on the ground, which he did. This reduced the flames, and appellant removed his shorts, which he left on the street. Thies and Visser drove him to Thies's house, and then to Lakewood Community Hospital. Detective Biddle later accompanied Poh to the hospital, where he identified appellant. Poh also identified appellant at trial.

At the scene of the fire, Detective Biddle found the truck's interior smelling of gasoline. The visors, door liner, and carpet had melted. The soda bottle was on the driver's seat, and on the floorboard was a pile of ash shaped like a burnt flare. Outside were the flare gun and two pairs of burnt and melted shorts. Tied to one of them were a Dodge key and a fob, which operated the truck and its alarm. Criminalist Bockrath matched DNA found on one pair of shorts to appellant, and trace evidence criminalist Vickie Clawson found gasoline on both shorts.

DISCUSSION

1. Sufficiency of Evidence of Robbery.

Appellant first contends that there was insufficient proof that he committed a robbery. He reasons that the subject of the robbery was the $100 bill he extracted from Renteria's truck, and there was no substantial evidence that he was aware that the money was there and formed the intent to deprive the victim of it until after appellant used force against the victim (in taking the truck). Appellant relies on the rule that robbery, as distinguished from theft, requires that the intent to steal exist before or at best during the use of force. (E.g., *People v. Lindberg* (2008) 45 Cal.4th 1, 28.)

Appellant's contention lacks merit. First, the premise that the subject of the robbery comprised only the $100 that appellant told his friends he found in the stolen truck is not necessarily accurate. The information did not so allege. Furthermore,

appellant clearly robbed Renteria of the truck, together with its contents. Although the forcible taking of the truck, with intent to deprive permanently, also constituted carjacking under section 215, appellant could properly be convicted of both robbery and carjacking for the conduct (although he could not be punished for both). (§ 215, subd. (c); *People v. Ortega* (1998) 19 Cal.4th 686, 700.)

Relying on one remark during final argument, appellant claims the prosecutor "elected" to base the robbery count on the taking of the $100 in the truck.[6] The prosecutor's statement did not necessarily bear that intent or have that effect. (See *People v. Ortega, supra,* 19 Cal.4th at p. 699.)

Even assuming the cash in the truck was the subject of the robbery count, appellant's claim of insufficient evidence still fails, because appellant harbored the intent to steal the truck and its contents from Renteria when appellant applied force to him. Thies testified that he and appellant had stopped near the truck so they could take it. It may be readily inferred that when appellant proceeded to wrest the vehicle violently from Renteria, he intended to "take" not only the truck but also whatever it contained. It was not necessary to the offense that appellant have known in advance exactly what was inside the truck.

People v. DeLeon (1982) 138 Cal.App.3d 602 reached an identical conclusion on very similar facts. There the defendants assaulted a motorist and took his car. In the car, they found a briefcase containing valuable coins. Defendants abandoned the car and "took off with the money." (*Id.* at p. 605.) Convicted of robbery and related offenses, defendants contended that the evidence of robbery was insufficient. The Court of Appeal held that the evidence was sufficient regardless of whether the subject of the robbery was the car or the coins. With respect to the latter, the court stated: "The conviction of robbery on count I is also sustainable as a robbery of the coins, based on the theory that when appellants took the car by force they intended to deprive the owner permanently of

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6 The prosecutor's statement was, "The robbery applies to money in this case."

whatever contents of the car appellants found to be of value." (*Id.* at p. 607; cf. *People v. Lewis* (2008) 43 Cal.4th 415, 465; *People v. Brito* (1991) 232 Cal.App.3d 316, 325-326.) Substantial evidence establishes that appellant intended to steal both the truck and its contents at the time he forcibly did so, and therefore the evidence supports the robbery conviction.

In a further, derivative contention, appellant claims that the alleged insufficiency of the robbery conviction deprives the robbery murder special circumstance of substantial evidentiary support and also requires reversal of the felony murder conviction, which might have been based at least partly on a finding of robbery (as distinguished from carjacking). Because there was no deficiency in the proof of robbery, this contention also lacks merit.

2. Failure to Instruct on Lesser Offenses.

Appellant contends that in three respects the trial court erroneously failed to instruct on lesser included offenses. We find none of these claims meritorious.

A. Theft.

Appellant contends that the court erred in denying his request for an instruction on theft as a lesser included offense of robbery and that this error requires reversal of not only the robbery count but also the robbery special circumstance and the felony murder conviction. We disagree.

Theft is a lesser included offense of robbery. (E.g., *People v. Ortega*, *supra*, 19 Cal.4th at p. 699.) Instructions on a lesser included offense, however, must be given only if there is substantial evidence from which the jury could find that the defendant did not commit the charged offense and committed only the lesser. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) The trial court here declined to instruct on theft because it concluded that such instructions were not warranted by substantial evidence in this fashion.

Appellant contends there was substantial evidence from which the jury could have concluded that appellant's intent to deprive Renteria of the money in the truck did not arise until after appellant had forcibly taken the truck from him, and hence appellant

committed only theft, not robbery, of the money. This was not the state of the evidence. The taking of the truck and the money inside occurred at the same time, by force, after appellant had formed the intent to steal the truck and, by implication, its contents. A theft instruction therefore was not appropriate. (Cf. *People v. Mendoza* (2000) 24 Cal.4th 130, 174.)[7]

B. Involuntary Manslaughter.

Appellant also assigns as error the trial court's refusal to instruct on involuntary manslaughter (§ 192, subd. (b)) as a lesser included offense of first degree felony murder.

The basis for appellant's claim is that the evidence warranted a finding of homicide short of robbery felony murder, because the jury could have found that appellant did not form an intent to steal the money in the truck until after he applied force – ultimately fatal – to Renteria. That premise remains mistaken. Appellant's intent to permanently deprive Renteria of the truck and its contents preexisted and accompanied appellant's use of force on the victim. There was no evidence that the homicide was less than first degree felony murder. (See *People v. Breverman, supra,*19 Cal.4th at p. 162.)

Furthermore, the court's ruling also was correct because running over Renteria could not legally have constituted involuntary manslaughter. The statutory definition of that offense, subdivision (b) of section 192, provides that "This subdivision shall not apply to acts committed in the driving of a vehicle." Appellant's rejoinder that "the killing took place during the 'taking' and not 'driving' of the vehicle in the traditional meaning" is unrealistic and unsupported by any authority.

In his reply brief, appellant argues that if the vehicular nature of the killing precluded its constituting involuntary manslaughter under subdivision (b) of section 190.2, the court should instead have instructed on vehicular manslaughter under

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[7] Because there was no evidentiary basis for the requested instruction, its refusal did not constitute a due process violation under *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739. This also holds true with respect to the other lesser offense instructions discussed below.

subdivision (c) of the section. Appellant acknowledges, however, that vehicular manslaughter is not a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988, 992.) It is a lesser related offense, and as such, vehicular manslaughter was not subject to instruction absent a defense request and the prosecution's agreement, neither of which occurred here. (*People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387.)

C. Second Degree Murder.

Appellant did not request second degree murder instructions below. He now contends, however, that the court should have instructed spontaneously on second degree murder as a lesser included offense of first degree murder since there was substantial evidence that he committed only the lesser offense. We disagree.

First, the assertion that second degree murder constituted a necessarily included offense is problematic. Although second degree murder is such an offense with respect to premeditated first degree murder (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344-1345), our Supreme Court expressly has not determined "whether second degree murder is a lesser included offense when, as here, the prosecution proceeds solely on the theory that the killing is first degree murder under the felony-murder rule and does not argue that the killing is first degree murder because it is willful, deliberate, and premeditated." (*People v. Romero* (2008) 44 Cal.4th 386, 402.) Because first degree felony murder may be committed without fulfilling all the elements of second degree murder, the latter would not qualify as a lesser included offense of the former. (E.g., *People v. Lopez* (1998) 19 Cal.4th 282, 288.)

But even assuming second degree murder constituted a lesser included offense in this case, there was insufficient evidence of that offense to require instruction on it. As appellant implicitly recognizes, there was no evidence that he killed Renteria with express malice, i.e., intent to kill. (§ 188.) Nor was there a showing that, as appellant would have it, he committed the killing with implied malice, by deliberately and intentionally driving the truck in a manner dangerous to life, with knowledge of that danger and with conscious disregard for life. (*People v. Lasko* (2000) 23 Cal.4th 101,

107.) Hence, the failure to instruct on second degree murder does not require reversal or reduction of appellant's first degree felony murder conviction.[8]

3. Excessive Punishment.

Appellant contends that his sentence of life without possibility of parole for committing a homicide without intent to kill exceeded the limits of proportionality imposed by Article I, section 17 of the California Constitution, and the Eighth Amendment to the United States Constitution. Both constitutional regimes prohibit punishment that is disproportionate to the offense, as defined and as committed, or to the defendant's individual culpability. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 478-479; 286; *Kennedy v. Louisana* (2008) ___ U.S. ___,___ [128 S.Ct. 2641, 2649-2650]; *Enmund v. Florida* (1982) 458 U.S. 782, 798 (*Enmund*).) We do not agree with this claim.

Appellant was convicted of personally killing the victim in the course of committing carjacking and robbery. Appellant grounds his position that LWOP was disproportionate to the offense and to his culpability on the following factors: (1) appellant was 18 years old when he committed the killing; (2) he did not intend to kill or even to injure Renteria; (3) the penalty imposed for this unintentional killing exceeds that prescribed for premeditated first degree murder. (See §§ 190, subd. (a), 190.2, subd. (a).)

As respondent points out, these factors are not as one-sided as appellant suggests. Appellant was less than a month shy of 19 years old when he committed the offenses, and he had been convicted of another robbery that same year. Before the present offenses, appellant violated probation granted in that robbery case. Furthermore, although he may initially have intended simply to steal an unoccupied truck, when appellant encountered Renteria, he proceeded intentionally to use force against him before running him over. Finally, our Supreme Court has rejected constitutional challenges to section 190.2,

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[8] Appellant separately argues that the three claimed instructional errors discussed above were cumulatively so prejudicial as to require reversal. Because we have found that there was no instructional error, appellant's argument is not well taken.

subdivision (a)(17)'s prescription of not only LWOP but also the death penalty for unintentional felony-murderers, raised in light of the lesser penalty for premeditated murder. (*People v. Kennedy* (2005) 36 Cal.4th 595, 640; *People v. Anderson* (1987) 43 Cal.3d 1104, 1146-1147.)

On the federal constitutional issue, appellant notes that in *Enmund, supra,* 458 U.S. 782, the court reversed as disproportionate a death sentence imposed on a getaway driver in a robbery who remained outside in the car while one of his cohorts shot and killed the two robbery victims. The court held that a defendant who neither kills, attempts to kill, nor intends that a killing occur cannot be subject to capital punishment. This limitation does not, however, constitutionally aid appellant. Appellant did kill the victim, and with respect to punishments short of death, the high court stated shortly after *Enmund*, "clearly no sentence of imprisonment would be disproportionate for Enmund's crime." (*Solem v. Helm* (1983) 463 U.S. 277, p. 290; see also *Cabana v. Bullock* (1986) 474 U.S. 376, 386.) Moreover, in *Tison v. Arizona* (1987) 481 U.S. 137, 158, the court declared that absence of intent to kill is not a constitutional barrier to the death penalty and that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." Appellant's LWOP sentence was not unconstitutional.[9]

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[9] Appellant originally contended that the trial court's imposition of a $10,000 suspended parole revocation fine was unauthorized under section 1202.45, because appellant's LWOP sentence did not "includ[e] a period of parole." (*Ibid.*) However, the Supreme Court has ruled in *People v. Brasure, supra,* 42 Cal.4th 1037, 1075, that such a fine does apply where, as here, a defendant is sentenced to a determinate term in addition to a sentence that does not involve parole (in *Brasure*, a death sentence). In light of *Brasure,* appellant has conceded the parole fine issue in his reply brief, and we agree.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOHR, J.*

We concur:

FLIER, Acting P. J.

BIGELOW, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.